Summary of Commission Decision

of 11 May 2016

declaring a concentration incompatible with the internal market

(Case M.7612 — Hutchison 3G UK/Telefónica UK)

(notified under document C(2016) 2796)

(Only the English version is authentic)

(2016/C 357/08)

On 11 May 2016 the Commission adopted a Decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [1]*, and in particular Article 8(3) of that Regulation. A non-confidential version of the full Decision, as the case may be in the form of a provisional version, can be found in the authentic language of the case on the website of the Directorate-General for Competition, at the following address: http://ec.europa.eu/comm/competition/index_en.html*

I. THE PROCEDURE

(1) On 11 September 2015, the Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking CK Hutchison Holdings Limited ('CKHH'), through its indirect subsidiary Hutchison 3G UK Investments Limited ('H3GI' or the 'Notifying Party' [2]), acquires, within the meaning of Article 3(1)(b) of the Merger Regulation, control of the whole of the undertaking Telefónica Europe Plc ('O2'), by way of purchase of its shares (the 'Transaction') [3]. The Notifying Party and O2 are referred to collectively as the 'Parties'.

(2) After the phase I investigation the Commission concluded that the Transaction raises serious doubts as to its compatibility with the internal market and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 30 October 2015. Based on the phase II investigation which supplemented the findings of the phase I market investigation, the Commission issued a Statement of Objections on 4 February 2016. The Notifying Party submitted its written comments on the Statement of Objections on 26 February 2016. At the request of the Notifying Party, an oral hearing was held on 7 March 2016. The Notifying Party submitted commitments on 2 March 2016, on 15 March 2016 and on 6 April 2016. On 17 March 2016 and on 23 March 2016 the Commission addressed to the Notifying Parties letters where it pointed out additional evidence in the Commission's file in support of the preliminary findings of the Statement of Objections. On 29 March 2016 and 4 April 2016 the Notifying Party submitted written comments to the two Letters of Facts of 17 March 2016 and on 4 April 2016, respectively. The Advisory Committee discussed the draft of the Decision on 27 April 2016 and issued a favourable opinion.

II. THE PARTIES AND THE CONCENTRATION

(3) H3GI is an indirect wholly owned subsidiary of CKHH. CKHH is a multinational group headquartered in Hong Kong and listed on the Hong Kong Stock Exchange Limited. CKHH has five core businesses: ports and related services, retail, infrastructure, energy, and telecommunications. CKHH's indirect wholly owned subsidiary, Hutchison 3G UK Limited ('Three') is a Mobile Network Operator ('MNO') in the United Kingdom. Three offers mobile telecommunications services such as voice, SMS, MMS, mobile internet, mobile broadband, roaming and call termination services.

(4) O2 is also active in the United Kingdom and offers mobile telecommunications services such as voice, SMS, MMS, mobile internet, mobile broadband, roaming and call termination services. O2 belongs to Telefónica S.A. ('Telefónica'), a holding company of a group of companies that operate fixed and mobile communication networks.

(5) On 24 March 2015, H3GI, Hutchison 3G UK Holdings (CI) Limited (a parent company under the sole control of CKHH), and Telefónica SA entered into a Sale and Purchase Agreement under which H3GI acquires all of O2's shares. During the course of the proceedings the Notifying Party presented two alternative Transaction structures. Regardless of the structure under which the Transaction will be implemented, the Commission considers that the

[1] OJ L 24, 29.1.2004, p. 1.

[2] Unless otherwise specified, for simplicity in the following the term 'Notifying Party' will be used to refer to both H3GI, CKHH and the other subsidiaries of the latter.
On 9 March 2016, H3GI has changed the name of its legal entity to CK Telecoms UK Investments Limited ('CTUI'), which is therefore the addressee of the Decision.

[3] OJ C 310, 19.9.2015, p. 5.

Transaction consists of an acquisition of sole control by H3GI (and ultimately by CKHH, which under both Transaction structures will continue to exercise sole control over Three) over O2 and accordingly constitutes a concentration within the meaning of Article 3(1)(b) Merger Regulation.

III. EU DIMENSION

(6) The Transaction has an EU dimension within the meaning of Article 1 of the Merger Regulation.

IV. REFERRAL

(7) On 4 December 2015, the Commission adopted a decision rejecting the United Kingdom's Referral Request. The Commission considers that the criteria for a referral provided for in Article 9(2)(a) of the Merger Regulation are fulfilled with regard to the Transaction. However, in exercising its discretion, the Commission does not consider it appropriate to refer the Transaction to the CMA for a number of reasons, including the need for the Commission to ensure a coherent and consistent approach when assessing mergers in the telecom sector in different Member States and its own significant previous expertise in assessing concentrations in the European mobile telecommunications markets.

V. THE UNITED KINGDOM MOBILE TELECOMMUNICATIONS SECTOR

(8) The retail mobile telecommunications market in the United Kingdom is well functioning and very competitive at present. The United Kingdom is one of the most advanced countries in the European Union in terms of 4G technology roll-out and 4G services take-up.

(9) Convergence of mobile and fixed communications is a trend in telecommunications towards removing differences between fixed and mobile networks. There are two aspects to convergence, one related to changes in technology and the other one to the ability of operators to offer bundles of mobile and fixed services. With respect to the latter, the Commission considers that the adoption of fixed-mobile bundles in the United Kingdom has been very limited and that it is unlikely to significantly increase in the near future.

(10) There are four MNOs in the United Kingdom. Other than the Parties, these are EE ([1]) and Vodafone. All MNOs in the United Kingdom have rolled out their networks with another MNO. The network sharing arrangements in place are CTIL/Beacon between O2 and Vodafone, on the one hand, and MBNL between Three and BT/EE, on the other hand. These agreements have contributed to the competitiveness of the market.

(11) The market in the United Kingdom is also characterised by a large number of mobile operators which do not own a network. These are the mobile virtual networks and branded resellers, together referred to as non-MNOs.

(12) MNOs and non-MNOs sell mobile contracts to end customers directly through their own retail outlets, online or by telemarketing. They also sell mobile contracts indirectly through independent retailers (such as Dixons), with those retailers selling mobile subscriptions through their own retail stores, online and through telesales. Within independent retailers, a distinction can be drawn between independent specialist retailers, on the one hand, and generalist retailers and specialist electrical retailers, on the other hand.

VI. RELEVANT MARKETS

(13) The Commission has raised objections as regards the effects of the Transaction with respect to the provision of retail mobile telecommunications services and wholesale services for access and call origination on public mobile telephone networks. Therefore, relevant product and geographic market for these services are defined as follows:

a. Retail market for mobile telecommunications services

(14) The Commission considers that, in line with its decisional practice, mobile telecommunications services constitute a separate market from fixed telecommunications services. Further, the Commission considers that mobile services and over the top services ('OTT') are not substitutable as at the very least a mobile data connection is required to access OTT instant messaging and voice services. Given the very limited penetration of multiple-play offers with a mobile component in United Kingdom, for the purposes of the present case it is not necessary to define a separate product market for multiple-play offers including a mobile component.

([1]) As BT has closed its acquisition of EE, for the purposes of the assessment of the Transaction, following the unconditional approval of the merger by the Competition and Markets Authority (CMA), the national competition authority of the United Kingdom, the Commission considers BT and EE as a single entity.

(15) As regards the market for the provision of mobile telecommunications services to end customers, consistent with its previous decisional practice, the Commission concludes that separate markets for the provision of retail mobile telecommunications services should not be identified according to: the type of technology (2G, 3G and 4G); the type of service (voice SMS/MMS and data); the type of contract (pre-paid and post-paid), and the type of end-customer (business and private). Pre-paid and post-paid services, as well as services to business and private customers are assessed as separate segments.

(16) Further, in this case, the Commission has investigated the possible distinction between mobile services sold in contracts including the purchase of a handset ('handset contracts') and pure mobile subscriptions ('SIM only contracts'), as well as a possible distinction by distribution channel (direct or indirect). These distinctions appear to be particularly relevant in the United Kingdom. The Commission considers that the definition of separate markets along these lines is not necessary as these distinctions constitute rather different segments within the same market.

(17) In line with previous Commission decisions, and with the view of the Notifying Party, the Commission concludes that the relevant geographic market for the assessment of this case is national in scope, and corresponds to the territory of the United Kingdom.

b. **Wholesale market for access and call origination on public mobile networks**

(18) In line with previous cases, the Commission concludes that the relevant product market for the assessment of the present case is the market for wholesale access and all origination on public mobile telephone networks. The Commission concludes that the geographic scope of the market is the territory of the United Kingdom.

VII. **COMPETITIVE ASSESSMENT**

a. **Retail market for mobile telecommunications services**

(i) *Horizontal non-coordinated effects arising from the elimination of important competitive constraints*

(19) The Transaction would combine the operations of O2 and Three, respectively the first and the fourth players by subscribers (the second and the fourth by revenues) in the retail market for the provision of mobile telecommunications services in the United Kingdom, creating a market leader by number of subscribers and revenues and significantly increasing the level of market concentration.

(20) Three is the latest network operator to have entered the market and has been the driver of competition since its entry, for example by changing the industry trend of restricting data usage and data price increases. Its recent and current market behaviour shows that it is the most aggressive and innovative player. Namely, it offers the most competitive prices in the direct channel, and offered 4G at no extra cost, forcing the industry to abandon strategies to sell 4G at a premium. It also offered such popular propositions as free international roaming and was the first to launch a voice over LTE ('VoLTE') service. Despite being a late entrant, Three managed to build out an excellent network as shown by independent surveys, network tests carried out by independent network performance firms, and data by the national regulator Ofcom. In particular its network was rated as the most reliable of the networks in the United Kingdom.

(21) Absent the Transaction Three is likely to continue to compete strongly. Based on the available evidence in its file, the Commission considers it unlikely that Three's ability to compete will materially deteriorate in the next two to three years. In particular, as explained in Annex C (a summary of which is attached) it is unlikely to experience [capacity constraints]. Further, Three is financially sound […]. […] external analyses forecast a dynamically expanding business.

(22) Therefore, pre-Transaction Three constitutes an important competitive force pursuant to paragraph 37 of the Horizontal Merger Guidelines, or in any event it exerts an important competitive constraint on that market, and that it is likely to continue exerting such a constraint absent the Transaction.

(23) O2 has the strongest brand in the market and in the past seven years it has consistently achieved the highest customer satisfaction scores. Its success is due to its customer centric propositions, such as its transparent and flexible Refresh tariff, its popular loyalty programme, its customer friendly technology experts and its excellent customer service. It has also launched popular non-MNOs such as giffgaff and it owns 50 % of Tesco Mobile. Its popularity with customers and its brand image is a strong asset that exerts significant pressure on other competitors. As explained in Annex C (a summary of which is attached), the Commission considers that O2's ability to compete will […]. Further, it also has healthy finances and thus retains the ability to invest and grow.

(24) The Commission therefore considers that pre-Transaction O2 exerts an important competitive constraint and that it is likely to continue exerting such a constraint absent the Transaction.

(25) The Commission also notes that Three and O2 are the only mobile network operators in the United Kingdom whose market shares have been constantly growing over the last years and that they compete closely between each other and the other MNOs.

(26) The Transaction would eliminate the competitive constraints that Three and O2 exercised on each other and on the other MNOs, which would result in significantly weakened competition on the retail market. In particular, based on the overall evidence in its file, it appears likely that the merged entity will compete less aggressively and would raise prices. It will be the largest MNO with little, if any incentive to be price aggressive. The Commission finds it likely that, given EE's and Vodafone's history and current strategy and positioning, they are likely to follow price increases by the merged entity.

(27) In addition, as illustrated in Section VII.a.ii of this summary, the Commission also finds that the Transaction is likely to have a negative impact on the ability to compete of the remaining MNOs, which in turn would likely reduce those players' ability to compete on price and other parameters (innovation, network quality). Indeed, the Transaction will disrupt the existing well-functioning network sharing arrangements in the mobile market in the United Kingdom.

(28) Given their limited ability to compete, in particular on data, and to innovate due to their dependence on MNOs, the Commission considers that non-MNOs will not be able to counterbalance the loss of competitive pressure resulting from the Transaction. Independent specialist retailers (Dixons), while generally succeed to improve on MNOs' offers, do not have the ability to compensate for the loss of competition among MNOs.

(29) The Commission has also undertaken an in-depth quantitative assessment of the likely price effects of the elimination of competition in the retail market. Such quantitative assessment is carried out in detail in Annex A to the Decision ([1]). Absent the harm resulting from network sharing, the Commission considers that the Parties would have significant incentives to increase prices post-Transaction. […].

(30) The Commission considers that its quantitative analysis supports the conclusions reached by the qualitative market investigation. In the Commission's view, the Transaction is likely to generate a sizeable incentive to increase prices in the mobile market in the United Kingdom. Moreover, the Commission notes that the […] customers of Three and O2 are expected to face price increases that are significantly higher than average.

(ii) *Horizontal non-coordinated effects arising from network sharing*

(31) As mentioned above, the four network operators have entered into two network sharing agreements: Vodafone and O2 in the CTIL/Beacon agreements and Three and BT/EE in the MBNL agreements. Today, the partners of each network sharing arrangements have an incentive to jointly develop the shared elements of their networks with a view to achieving a better network than the other MNOs and in particular than the MNOs in the other network sharing arrangement.

(32) Post-Transaction, this healthy competitive dynamic would be lost. The merged entity would be part of both network sharing agreements and each of Vodafone and BT/EE would no longer have a fully committed network sharing partner in, respectively, CTIL/Beacon and MBNL.

(33) In more detail, the Commission considers that the implementation of the network consolidation plans as presented to the Commission by the Notifying Party, following the reduction of competing MNOs, would significantly harm the competitive position of either one or both of the Parties' partners in the network sharing arrangements.

(34) The Notifying Party submitted in particular two network consolidation plans, the 'Preferred Plan' and the 'Alternative Plan'.

(35) The Preferred Plan is likely to result in a significant impediment to BT/EE's ability to compete in the mobile telecommunications markets in the United Kingdom.

(36) The Alternative Plan is likely to result in a significant impediment to BT/EE and Vodafone's ability to compete in the mobile telecommunications markets in the United Kingdom. It also harms to a lesser extent the competitive position of BT/EE.

([1]) The quantitative assessment performed by the Commission is based also on data collected in a customer survey (the 'Survey'). The questionnaire and the methodology used in the Survey are contained in respectively Annex D and E to the Decision.

(37) Furthermore, the Commission notes that neither of these plans provide for a commitment of the merged entity to implement the network consolidation as presented to the Commission. Taking other possible integration scenarios into account, the Commission concludes that also in all other scenarios reviewed by the Commission the Transaction would harm the competitive position of either one or both of the Parties' partners in the network sharing arrangements.

(38) Therefore, the Commission considers that the Transaction is likely to reduce the competitive pressure exerted by either one or both of the other MNOs that are partners of the Parties in the network sharing arrangements.

(39) Besides, the network sharing situation resulting from the Transaction under the Alternative Plan is likely to lead to less industry-wide investments into network infrastructure, reducing the level of effective competition which would have prevailed in the absence of the Transaction.

(40) The reduced competitive pressure and the less industry-wide investments into network infrastructure are likely to lead to a significant impediment of effective competition in an oligopolistic market featuring a limited number of players and high barriers to entry for this reason too.

(iii) *Countervailing factors*

(41) The Commission considers, on the basis of its market investigation, that there are no countervailing buyer power or entry such as to offset the possible anticompetitive effects of the Transaction.

(iv) *Conclusion*

(42) Since the horizontal non-coordinated effects described above cannot be offset by efficiencies (see Section VII.c of this summary), on the basis of the above, the Commission concludes that the Transaction would lead to a significant impediment of effective competition in the retail market for mobile telecommunications services in the United Kingdom.

b. **Wholesale market for access and call origination on public mobile networks**

(i) *Horizontal non-coordinated effects arising from the elimination of important competitive constraints*

(43) In addition to the retail market, the Parties are active on the wholesale market for network access and call origination. On this market, MNOs provide hosting services to non-MNOs which in turn offer retail services to subscribers.

(44) Currently all four MNOs offer wholesale access to non-MNOs. The largest wholesale host currently is EE, followed closely by O2. Both EE and O2 have market shares which are growing stably. Vodafone is the third largest host and its market share has been declining in the past three years. Three is the smallest wholesale access host.

(45) Despite Three's relatively low historical market share, the Commission considers, on the basis of its market investigation, that Three is an important competitive force in the wholesale market. The Commission has conducted an analysis of share of recently contested customers by projected value. According to these, Three's share is [10-20] %. In addition, the Commission has found evidence that Three has significantly improved its position in the wholesale market. Three has been participating in a number of competitive processes including for the largest non-MNOs and has concluded contracts with non-MNOs with growth potential which will allow it to further grow in the future absent the Transaction. Moreover, Three's presence in the wholesale negotiations has a competitive impact even in situations where Three is not successful. The Commission considers, on the basis of its market investigation, that Three provides competitive wholesale rates for new technologies, such as 4G. The Commission considers on the basis of its market investigation, that Three has invested in both its network and its resources to be able to compete more effectively on this market. Finally, the Commission considers, on the basis of the market investigation, that both Three itself and the other market participants (including MNO competitors and non-MNO wholesale customers) consider Three as an important competitor.

(46) On this basis, the Commission considers that Three constitutes an important competitive force, in accordance to paragraph 37 of the Horizontal Merger Guidelines. Absent the Transaction, Three would continue to grow in the wholesale market and exercise an important competitive constraint on O2 and the other MNOs.

(47) In relation to O2, the Commission considers, on the basis of the market investigation, that O2 exercises an important competitive constraint on Three and the other MNOs pre-Transaction and that this would continue absent the Transaction.

(48) Post-Transaction, the Commission considers that the reduction in the number of wholesale hosts would reduce the competitive position of non-MNOs. Also, the merged entity is likely to have lower incentives to host non-MNOs on commercially attractive terms than Three and O2 would have absent the merger. Finally, the reduction in competition on the wholesale market is unlikely to be offset by the remaining competitors on the market, BT/EE and Vodafone.

(ii) *Countervailing factors*

(49) The Commission considers, on the basis of its market investigation, that there is no countervailing buyer power or entry such as to offset the possible anti-competitive effects of the Transaction.

(iii) *Conclusion*

(50) Since the horizontal non-coordinated effects described above cannot be offset by efficiencies (see Section VII.c of this summary), on the basis of the above, the Commission concludes that the Transaction would lead to a significant impediment of effective competition in the wholesale services for access and call origination on public mobile telephone networks in the United Kingdom.

c. **Efficiencies**

(51) According to the Notifying Party the Transaction will lead to significant network and scale efficiencies. The network efficiencies would arise as radio access network ('RAN') consolidation would lead to densification of sites, increased use of spectrum (by deploying the combined spectrum on a denser grid), and more efficient use of spectrum (in particular through 'carrier aggregation'). These technical benefits would bring an increase in network capacity, network quality and speed compared to the sum of Three and O2 absent the Transaction. They would also lower network costs. These effects would benefit consumers as: (i) the merged entity would […]; (ii) reductions in incremental network costs would be passed on to consumers by the merged entity in terms of lower price; and (iii) the merged entity would exert greater competitive pressure on Vodafone and EE which would lead to lower prices by these rivals. Although these network efficiencies under Three's 'Alternative Plan' could not start to materialise before […], the Notifying Party submits that they nevertheless should be considered to satisfy the Commission's timeliness criterion as they are not subject to uncertainty. Moreover, the scale economies and fixed cost savings brought by the Transaction would facilitate the merged entity's ability to make future investments, in particular in spectrum.

(52) As regards the timeliness of network efficiencies, the Commission considers that there remains significant uncertainty regarding the timing and the extent of network integration and investments and hence whether claimed efficiencies would be achieved. Moreover, the fact that network efficiencies are not claimed to materialise before […] gives rise to significant uncertainty relative to the situation where such efficiency claims would materialise earlier. Therefore, even if the network efficiencies claimed by the Notifying Party satisfied the three criteria of the Horizontal Merger Guidelines (which is not the case, as explained in the following paragraphs), the Commission considers that the weight that can be placed on such efficiency claims is limited.

(53) Regarding the technical benefits from the consolidation of the two networks, the Commission notes that it appears plausible that the Transaction would allow to deploy the joint spectrum on a denser network compared to a stand-alone scenario. However, the extent could not be sufficiently verified with the information provided by the Notifying Party. The Parties would also have realistic alternatives to expand capacity on a stand-alone basis. Moreover, the Commission considers that any quality benefits from higher download speeds are likely limited. The Commission therefore concludes that the claimed technical benefits as well as associated cost and quality benefits do not satisfy the criteria of verifiability and merger specificity.

(54) The Commission further considers that there is a duality between Notifying Party's arguments whereby (i) the merged entity would […]. In the Commission's view, both lines of reasoning are conceptually different aspect of one and the same effect.

(55) [The Commission cannot verify the Notifying Party's arguments on this issue.]

(56) Regarding the second argument, the Commission does not exclude that the transaction might to some extent reduce the incremental network costs of the merged entity relative to the Parties' absent the transaction. However, the Commission considers that the Notifying Party's claims of zero or reduced incremental network costs do not pass the tests of merger specificity and verifiability. The Commission rejects the claim that the merged entity would have zero incremental network costs, and it cannot verify the level of incremental network costs for the merged entity proposed by the Notifying Party because of the severe limitations in the modelling used and lack of necessary data provided by the Notifying Party. Moreover even if the claim that the merged entity would have zero incremental costs were verifiable and merger specific, the pass-through of such reductions to consumers would not be sufficient to offset the incentives to increase price and the Transaction would still be likely to lead to significant price increases.

(57) The Commission also considers that the efficiencies claimed by the Notifying Party in relation to increased competitive pressure on EE and Vodafone through higher quality do not fulfil the three criteria of verifiability, merger specificity and benefit to consumers, as such efficiencies are largely based on assumptions and on arguments already dismissed by the Commission.

(58) Finally, regarding the Notifying Party's claim that the scale economies and fixed cost savings would facilitate the merged entity's ability to make future investments and acquire more spectrum, the Commission considers that the efficiencies through fixed cost savings, even if they were verifiable and merger specific, would not benefit consumers. Furthermore, the Commission considers the alleged increased ability to acquire spectrum due to the Transaction is not verifiable and, in any event, the Notifying Party failed to show how such efficiency would benefit consumers.

VIII. **COMMITMENTS**

a. **Procedure and timing**

(59) In order to address the competition concerns identified in the Statement of Objections, the Notifying Party submitted three sets of commitments: The Notifying Party submitted the first set on 2 March 2016 (the 'First Commitments'). On 15 March 2016, the Notifying Party submitted revised commitments (the 'Second Commitments'). The Commission launched a market test of the Second Commitments on 18 March 2016 (the 'Market Test'), addressed to (1) current and potential future providers of mobile telecommunications services in the United Kingdom, providers of infrastructure services in the mobile telecommunications sector, as well as the associations MVNO Europe and iMVNOx; and (2) national telecommunications regulators, including Ofcom. In addition, the national competition authorities of the United Kingdom, Germany, and the Netherlands provided their views on the Second Commitments. Following the Market Test, the Notifying Party submitted another revised set of commitments on 6 April 2016 (the 'Third Commitments').

b. **Description of the Second Commitments**

(60) The Second Commitments comprised the following components: (1) the New Entrant Operator ('NEO') Commitment; the (2) Tesco Mobile Commitment; (3) the Network Sharing Commitment; and (4) the Wholesale Market Commitment.

(i) *Tesco Mobile Commitment*

(61) Under the Tesco Mobile Commitment Three commits, first, to divest its 50 % stake in Tesco Mobile.

(62) Second, Three commits to offer a capacity based wholesale agreement to Tesco Mobile for a period of […] years. Three would make available up to […] % of capacity of the Network in return for a fixed annual fee to be agreed by Three and Tesco Mobile. Three would make the capacity available provided that Tesco Mobile has its own core network. Until Tesco does not have its own core network, Three commits to continue the wholesale access arrangements currently in place between O2 UK and Tesco Mobile.

(ii) *NEO Commitment*

(63) Under the NEO Commitment Three commits, first, to divest a perpetual fractional network ownership interest, amounting to up to […] % of the capacity ('Capacity Share') in the Network to one or two NEOs. The minimum amount of capacity to be used by the NEO(s) varies over time. A NEO is prevented from reselling the capacity.

(64) The NEO(s) will pay an agreed fixed price to Three in consideration for the network ownership interest entitling it/them to the use of the Capacity Share. In addition, the NEO(s) will pay, on an annual basis, a share corresponding to the percentage of their ownership interest of the running operating expenses, as well as ongoing capital maintenance and improvement costs incurred by Three for the Network plus a return on capital.

(65) The NEO(s) will have non-discriminatory access to all elements of the Network and to all current and future radio technologies, features and services deployed in the Network. The NEO(s) will have to provide own core network(s).

(66) The NEO(s) will be updated and consulted on Three's technology and network roadmap plans. Three will retain sole control over all decisions concerning the operation of the Network and investments in the Network. Three will discuss in good faith requests by the NEO(s) for network investments that are not part of the network roadmap. If no agreement can be reached on such investments, they will be implemented either entirely at the expense of the NEO(s) (if the investment can be technically separated on the Network for the NEO's own use) or with a capped financial contribution by Three (in return for a full right by Three to use such investment).

(67) The ownership interest is non-transferrable for a period of […] years. After this period, it can be transferred, subject to a right of first refusal by Three.

(68) The NEO can request that the ownership interest be provided to the NEO using air interface prioritisation such as 4G MOCN or equivalent functionality.

(69) Second, Three commits to offer an option for the NEO(s) to exclusively use the capacity provided over a total of […] MHz spectrum in different spectrum bands currently owned by O2 UK ('Target Spectrum Use Option'). The Target Spectrum Use Option would be available as of year […] following the acquisition of the network ownership interest and be subject to a number of conditions.

(70) Third, Three commits to offer an option for the NEO(s) to acquire O2 UK ('O2 UK Divestment Option'). The O2 UK Divestment Option can be exercised by the NEO(s) within […] following the divestment of the network ownership interest and is subject to a number of conditions. If the NEO(s) were to prefer to acquire a stake in Three instead, Three commits to discuss this request in good faith.

(71) Finally, Three can decide whether to provide the network ownership interest to one or two NEOs. In case of two NEOs, the capacity share of one NEO would be at least […] %. The Target Spectrum Use Option and the O2 UK Divestment Option will have to be exercised by the NEO with the […] % ownership interest. Three can also decide to provide an ownership interest of only […] % provided that the capacity share made available to Tesco Mobile also amounts to […] % instead of […] %.

(iii) *The Network Sharing Commitment*

(72) The fourth component is the Network Sharing Commitment by which Three commits, among others, to: (1) offer to EE a number of amendments to the MBNL agreements, including a fest-track dispute resolution, aimed at facilitating unilateral network investments, to agree on a new business plan with EE on the basis of the current business plan, and to waive rights for a casting vote following the change of control in EE on certain decisions; (2) complete the Beacon network within a given deadline, offer to Vodafone to re-enter into the active sharing agreements except for […] in case they are terminated by the merged entity, and to offer to Vodafone the partitioning of the transmission of 4G traffic according to certain rules; (3) to implement a certain network structure (a variation of the so-called 'Preferred Plan', whereby the merged entity would commit to the Beacon grid and use around […] additional MBNL sites), and (4) to enhance information barriers in relation to MBNL and Beacon. The business plan for MBNL and the active sharing agreement under Beacon would cover a time period up to […].

(iv) *The Wholesale Market Commitment*

(73) Under the Wholesale Market Commitment, with respect to MVNOs that already have an MVNO agreement with either Three or O2 UK, and such agreements do not yet include access to 4G services, Three commits to offer to include 4G services on the same rates as charged for 3G services (i.e., at no extra cost).

(74) With respect to MVNOs which do not have an MVNO agreement with either Three or O2 UK, Three commits to offer wholesale access (including 4G) to such new MVNOs. The terms and conditions will be benchmarked against the average of those offered by Three and O2 UK as at the date of closing taking into account the size and type of the MVNO, type of products and services, volumes, prices, commercial/operational model and other relevant commercial terms. This Commitment shall continue for 10 years after closing or such earlier date on which H3GI ceases to offer such technology to its own end customers.

c. **Assessment of the Second Commitments**

(75) Despite some interest in the NEO Commitment and the Tesco Mobile Commitment, the Market Test was negative on all elements of the Second Commitments. Based on the results of the Market Test, the Commission considered that the Second Commitments did not address the competition concerns identified.

(76) As regards the Tesco Mobile Commitment, the Commission considered that it was uncertain if the divestment of O2's 50 % stake in Tesco Mobile would ever materialise. The capacity based wholesale agreement was not firmly committed but merely an offer and the Commission considered that it was uncertain whether Tesco Mobile would ultimately obtain wholesale access under that capacity based wholesale agreement. Even if that would have been the case, the Commission considered that the terms of the agreement as set out in the Second Commitments were unclear on a number of elements. Moreover, the […] % capacity offered on the O2 network were considered to be insufficient to allow Tesco Mobile to compete in the short, medium and long-term. Finally, the Commission did not agree with the Notifying Party's argument that the Tesco Mobile Commitment (even if taken together with the NEO Commitment), would reduce the predicted price increases (or eliminate them altogether.

(77) Similarly, the Commission considered that the NEO Commitment was insufficient (even if taken together with the Tesco Mobile Commitment) to address the competition concerns identified on the retail market. In particular, a NEO would have been commercially and technically dependent on its host MNO. It would have had a cost structure that would not have allowed it to exercise a competitive constraint on other market participants, and in particular on MNOs and it would only have been able to differentiate its offerings, including in terms of quality, to a very limited extent. Also the growth potential of a NEO was questionable. Moreover, a number of elements of the NEO Commitment, including key commercial terms such as the annual costs to be borne by the NEO were not sufficiently clear. Finally, in addition to the Target Spectrum Use Option and the O2 UK Divestment Option, a number of other elements offered to the NEO(s) were equally optional and in light of the uncertainty of their implementation they could not be taken into account when assessing the adequacy of the Second Commitments.

(78) The Network Sharing Commitment added to the numerous inconsistencies and uncertainties regarding network sharing instead of removing uncertainties. The Network Sharing Commitment was internally inconsistent with the Notifying Party's stated plans as it committed to implement a nationwide network grid based primarily on the Beacon network while at the same time it offered to divest the Beacon network […] after the merger. Furthermore, the Network Sharing Commitment did not address the uncertainty in relation to the post-merger network sharing situation as there was no guarantee (it was even unlikely) that either EE or Vodafone would accept the Notifying Party's offers it committed to make under that Commitment.

(79) The proposed amendments of the MBNL agreements were insufficient to prevent harm to the competitive position of BT/EE following the merger. Half of the six proposed clarification or amendments merely reiterated existing contractual obligations. The removal of the casting vote of the managing director and the addition of a fast track dispute resolution mechanism are unable to address the competitive concerns. The statement that neither party of MBNL shall have the ability to delay or frustrate unilateral deployments of the other party by any means is too unsubstantiated and uncertain in its implementation. The fast-track dispute resolution mechanism will not help in maintaining the current ability of BT/EE to make unilateral investments. The vague description of the business plan offered by Three that mostly repeats existing obligations of Three is also insufficient to address the concerns raised by the transaction.

(80) The Network Sharing Commitment relating to Beacon was insufficient to exclude that the Transaction would impair the competitive position of Vodafone. Even though the Notifying Party offered to continue active sharing without […] after the unilateral termination of active sharing, is likely not acceptable to Vodafone. The submissions by Vodafone and O2 to Ofcom in 2012 when establishing Beacon show that […] was an integral element of the Beacon arrangements without which the parties would not have started active sharing. Therefore, the Commission concluded that Vodafone will likely not accept the offer and the harm to the competitive position of Vodafone following the termination of active sharing would not be addressed by the commitments.

(81) On lower industry-wide investments, the network sharing situation aimed for under the commitments would result in one independent network of BT/EE and two actively shared networks of Vodafone and the merged entity of which one would have a better 4G capacity layer. This will likely lead to fewer industry-wide investments by all remaining MNOs.

(82) The Wholesale Market Commitment as regards existing MVNOs was a mere offer the terms of which and thus its attractiveness for existing MVNOs were, at best, uncertain. 4G access would have been granted at current prices for 3G throughout the whole 10-year term. In light of decreasing costs for data which MNOs would be able to pass on, MVNOs would have been unable to compete against MNOs in the medium to long-term. Finally, the commitment did not include future technologies such as 5G. In relation to new MVNOs the Wholesale Market Commitment was also a mere offer. Wholesale prices would have been benchmarked against existing terms and would thus likely also have been uncompetitive in the medium to long-term. In addition, the benchmarking process was unclear. Finally, also this commitment did not include future technologies such as 5G.

d. **Description of the Third Commitments**

(83) The Third Commitments comprise the four components also contained in the Second Commitments in amended form. The commitment in relation to the certainty of the network plans, which was part of the Network Sharing Commitment in the Second Commitments has been made a stand-alone commitment. In addition, the Notifying Party commits to offer a capacity based wholesale agreement to Virgin Media (the 'Virgin Media Commitment').

(84) The Notifying Party amended the definition of capacity (so as to cover the capacity of the networks of both, Three and O2) and the network on which that capacity will be provided to Tesco Mobile, to the NEO(s) and to Virgin Media (the O2 network).

(i) *The Tesco Mobile Commitment*

(85) Other than the amended definition of capacity, no substantial changes were made to the Tesco Mobile Commitment.

(ii) *The NEO Commitment*

(86) The most important changes to the NEO Commitment are listed in the following paragraphs:

(87) First, the Notifying Party specified the minimum Capacity Share, expressed in Gbps, for years one to five. The time period for which a NEO would have to commit to a minimum Capacity Share to be utilised after year […] has been extended by […] years and now applies until year […].

(88) Second, the Ongoing Charges to be paid by a NEO were amended as follows: A NEO would pay cost-based charges measured in proportion to the Elected Capacity Share. The cost basis is to be agreed upon between the Notifying Party and a NEO and would include a cost-based return on capital.

(89) Third, as of year […] a NEO may offer wholesale access to MVNOs up to a maximum of […] % of its Elected Capacity Share.

(90) Fourth, the transfer of the Network Interest is no longer subject to a right of first refusal by the Notifying Party.

(91) Fifth, unilateral investments requested by a NEO would be given the same level of priority as investments of the Notifying Party.

(92) Sixth, the NEO Commitment now provides for a possibility of a NEO to opt out of certain features and investments. The opt-out would, however not be possible in respect of features or services which would lead to an improvement in coverage, capacity, peed or cost of the Network.

(93) Seventh, any dispute between a NEO and the Notifying Party in relation to unilateral investments that cannot be settled by mutual agreement would be subject to a fast-track dispute resolution procedure.

(94) Eighth, the O2 UK Divestment Option is modified such that the transfer of O2 would not take effect in advance of completion of the roll out of the so-called 'Beacon Single Grid Sites' which is required by […] in accordance with the Beacon agreements.

(95) Finally, the NEO Commitment is now an upfront commitment.

(iii) *The Virgin Media Commitment*

(96) Under the Virgin Media Commitment, the Notifying Party commits to offer to Virgin Media to enter into a capacity based wholesale agreement on the basis of an agreement referred to in the Third Commitments as the Virgin Mobile Short Form Wholesale Agreement.

(97) The Notifying Party would make a Capacity Share of approximately […] % of capacity of the combined network of Three and O2, delivered on the O2 network, available to Virgin Media for a period of […] years.

(98) In consideration for the capacity, Virgin Media would pay fees to the Notifying Party as specified in the Virgin Mobile Short Form Wholesale Agreement, which, in principle, provides for a fixed Gbps price for its elected Capacity Share until the end of […] and an amount calculated in accordance with the cost and pricing methodology set out in Appendix 3 to that agreement from […] until the end of the term of the arrangement. The minimum financial commitment by Virgin Media amounts to […] from the service start date until the end of year […].

(99) If the NEO were to exercise the O2 UK Divestment Option, H3GI would offer to Virgin Mobile an equivalent capacity agreement.

(100) Finally, the Notifying Party commits to make the offer to Virgin Mobile within […] days following the date of the adoption of a conditional clearance decision by the Commission. The offer would remain valid for a period of […] months from the date of receipt by Virgin Media.

(iv) *The Commitment in Relation to Certainty of Network Plans*

(101) Under the Commitment in Relation to Certainty of Network Plans, the Notifying Party commits, subject to the network sharing commitments, to use all Beacon sites for the base coverage and capacity grid of the consolidated network as well as a to use at least […] MBNL sites.

(102) Furthermore, it commits to deploy […] MHz of downlink spectrum on the network of O2 by […], to continue radiating at least the […] from the Beacon sites and to allow Three's customers to roam on the Beacon network only to the extent permitted under the current Beacon agreements.

(103) The Notifying Party also included a commitment to achieve at least 96 % 4G population coverage by 31 December 2017 and to fulfil its 4G population coverage commitments under the 4G license by 31 December 2018 as well as commitments to make available to the NEO any spectrum deployed on the O2 network and any radio access network that is owned by the Notifying Party and made available to customers of the Notifying Party on the O2 network.

(v) *The Network Sharing Commitment*

(104) Under the Network Sharing Commitments relating to BT/EE, the Notifying Party commits to offer to BT/EE an agreement amending MBNL on substantially the same terms as a draft agreement attached to the commitments. In addition, the Notifying Party unilaterally commits to certain elements of the draft agreement in case BT/EE would not accept the offer.

(105) The draft agreement provides for provisions regarding network integrations activities of the merged entity, information barriers, a minimum sites commitment, sites on which Three deploy not more than […] MHz of spectrum, sites on which Three deploys […] spectrum, integration costs, an indemnity for harm caused by integration activities, unilateral deployments, the fast-track dispute resolution mechanisms, the business plan, transmission and the waiver of rights acquired by Three following the acquisition of EE by BT.

(106) As a unilateral commitment in case BT/EE does not accept this offer, the Notifying Party commits to waive all rights under the MBNL agreements to object unilateral deployments of BT/EE on sites that do not carry any traffic on behalf of Three, to waive any rights under the MBNL agreements to raise concerns in the Technical Committee that are non-technical or non-operational in nature, to follow apply the fast track resolution mechanism set out in Schedule 1 to the proposed agreement for all concerns that are technical or operational in nature which result in a dispute with BT/EE, to approve a 10 year business plan in accordance with the one contained in Schedule 2 to the proposed agreement and to waive its rights following the change of control in BT/EE under the MBNL governance provisions.

(vi) *The Wholesale Market Commitment*

(107) The Wholesale Market Commitment has essentially been amended such as to include also 5G services.

e. **Assessment of the Third Commitments**

(108) Despite the improvements made compared to the Second Commitments, the Commission considers that the Third Commitments do not address the competition concerns.

(109) Although a term sheet was agreed between Tesco and the Notifying Party, the Tesco Mobile Commitment even if taken together with the NEO Commitment and the Virgin Mobile Commitment is inadequate to address the competition concerns on the retail market. In particular, the term sheet is not part of the Third Commitments and cannot therefore be taken as a benchmark for the adequacy of this commitment. Therefore, it remains uncertain if the divestment of O2's 50 % stake in Tesco Mobile would ever materialise. Similarly, the capacity based wholesale agreement remains a mere offer and the terms of the agreement as set out in the Third Commitments remain unclear on a number of elements. Moreover, despite the fact that the capacity share is now calculated on the basis of the capacity also of the network of Three, the […] % capacity offered Tesco's potential to grow its subscriber share would remain limited. Finally, the Commission continues to disagree with the Notifying Party's argument that the Tesco Mobile Commitment (even if taken together with the NEO Commitment, would reduce the predicted price increases (or eliminate them altogether).

(110) Similarly, although a term sheet was agreed between Sky and the Notifying Party, the Commission considers that the NEO Commitment remains insufficient (even if taken together with the other elements of the Third Commitments) to address the competition concerns identified at retail and at wholesale level. In particular, the term sheet

is not part of the Third Commitments and cannot therefore be taken as a benchmark for the adequacy of this commitment. A NEO continues to be commercially and technically dependent on its host MNO with a cost structure that does not allow it to exercise a competitive constraint on other market participants, and in particular on MNOs and very limited ability to differentiate its offerings, including in terms of quality. Also the growth potential of a NEO continues to be more limited than that projected by the Notifying Party. Moreover, a number of elements of the NEO Commitment, including its cost structure, continue to be unclear. Finally, in addition to the Target Spectrum Use Option and the O2 UK Divestment Option, a number of other elements offered to the NEO(s) were equally optional and in light of the uncertainty of their implementation they could not be taken into account when assessing the adequacy of the Second Commitments.

(111) The terms of the Virgin Media Commitment are to some extent unclear. In addition, this commitment is merely an offer for a capacity based wholesale agreement, the implementation of which is uncertain. Even if Virgin Media were to accept the offer, similar concerns as set out in relation to the Tesco Mobile Commitment apply in relation to the amount of capacity made available to Virgin Media.

(112) The commitments relating to the certainty of network plans are insufficient to address the considerable uncertainties as to the future network sharing situation following the Transaction. As the additional amendments compared to the Second Commitments rather relate to the NEO than aim to improving the certainty for BT/EE or Vodafone, the assessment is materially the same as for the Second Commitments.

(113) The proposed agreement with BT/EE does not address the concerns relating to the competitive position of BT/EE. In particular Three's ability to frustrate or delay unilateral deployments is not significantly decreased because a 'pre-approval' of certain deployments is conditioned upon compliance with the criteria that allowed Three to block or frustrate unilateral deployments in the first place. For this reason, it is also unlikely that BT/EE will accept such offer. The unilateral commitment relating to BT/EE is materially the same as the one offer committed to under the Second Commitments and, as discussed there, also insufficient to remedy the likely harm.

(114) Regarding the commitments towards Vodafone, the Third Commitments are substantially the same as the Second Commitments and therefore do neither address the competitive concerns. The same holds true for the concerns relating to the uncertainty of the merged entity's consolidation plans. The amendments in the Third Commitments are rather aimed at the NEO than at BT/EE or Vodafone.

(115) Although the Wholesale Market Commitment was amended such as to include 5G services, it continues to suffer from the shortcomings identified in relation to the Second Commitment, notably in relation to the envisage pricing for wholesale access. Therefore, the Wholesale Market Commitment is insufficient to address the competition concerns on the wholesale market.

IX. **CONCLUSION AND PROPOSAL**

(116) In view of all that precedes, the Commission concludes that the Transaction would significantly impede effective competition in the internal market or a substantial part thereof within the meaning of Article 2(3) of the Merger Regulation. This is because the Transaction would give rise to horizontal non-coordinated anti-competitive effects in the retail market for the provision of retail mobile telecommunications services in the United Kingdom, because it involves the elimination of important competitive constraints that the Parties currently exert on each other and on the other competitors, as well as because the Transaction is likely to reduce the competitive pressure exerted by either one or both of the other MNOs that are partners of the Parties in the network sharing arrangements and to lead to less industry-wide investments into network infrastructure. In addition, the Transaction would give rise to non-coordinated anti-competitive effects in the wholesale services for access and call origination on public mobile telephone networks in the United Kingdom by reducing the number of providers of wholesale access.

(117) The Third Commitments do not eliminate the identified competition concerns in the retail market for mobile telecommunications services and in the wholesale market for access and call origination on public mobile networks in the United Kingdom entirely and are not comprehensive and effective in all respects.

(118) The Transaction is, therefore, declared incompatible with the internal market and the EEA Agreement pursuant to Article 8(3) of the Merger Regulation.

Summary of Annex B

1. In Annex B the Commission assesses the Notifying Party's claim whereby evidence from recent mergers in the mobile telecommunications sector shows that such transactions lead to increased competition. To support this view, the Notifying Party submitted a paper on the effects on competition and consumer welfare of the acquisition of Orange Austria ('Orange') by Hutchison 3G Austria ('H3G') that was consummated in Austria in late 2012. According to the Notifying Party, the study shows that the merger in Austria led to a decrease in prices, an increase in investment and an overall positive effect on consumer welfare. The Notifying Party further commented on other recent studies which, in the Notifying Party's view, support its claim.

2. In its assessment, the Commission first notes that *ex-post* studies of mobile telecommunications mergers in other markets can contribute to the understanding the general effects of market concentration in the mobile telecommunications sector. However, the Commission does not consider that the results from such studies can replace the specific assessment of the Transaction. Therefore, the Commission can only give limited evidentiary weight to the experience gathered by studying mergers in related markets. In this case, as in the other cases, the Commission bases its review of the Transaction primarily on its assessment of the evidence and circumstances of the present case.

3. Second, the Commission considers that the study submitted by the Notifying Party presents shortcomings both in terms of methodology and interpretation of the results. Specifically, (i) the Commission disagrees with the Notifying Party's 'before and after' methodology, and considers that, in the context of mobile telecommunication markets, the 'difference in differences' methodology is more appropriate to assess the causal relation of mergers on market outcomes; (ii) the Commission disagrees with the Notifying Party's unit price measure, which confounds price developments with the evolution of demand and consumption, and consider the 'basket approach', whereby the consumption is held fixed, to be more reliable; and (iii) the Commission disagrees with the Notifying Party's view whereby the merger led to an increase in investments, quality and consumer welfare, as the Notifying Party did not provide sufficient evidence to establish that such increases were due to the merger.

4. Third, the Commission reviewed recent studies analysing the effects of consolidation on market outcomes in the mobile telecommunication sectors. The Commission considers that, although these studies contribute to the understanding of the effects of market concentration in the mobile telecommunications sector, due to the methodological challenges related to the complex sector characteristics and data limitations, such *ex-post* studies should be interpreted with caution especially in the assessment of future merger cases. The Commission also notes that the more reliable studies show that 'four to three' mergers tend to lead to price increases, and with respects to investments, the available evidence is insufficient to draw sound conclusions (although, conceptually sounder studies in this respect indicate that mergers tend to have no effect of industry level investments).

5. In any event, the Commission does not consider that the results from *ex-post* studies can replace the specific assessment of the Transaction.

Summary of Annex C

1. In Annex C the Commission undertakes the assessment of the Notifying Party's claims that Three's and O2's [future relative competitiveness is likely to decline].

2. Preliminary to that, the Commission notes that network quality is a broad concept that is determined by several factors, including speed. Average speed experienced by customers in high traffic areas and in the busy hour is determined to a large extent by the available capacity and the demanded mobile data traffic. Whereas average speed is an important factor of network quality, there are many others.

a. **Three**

3. In relation to Three, the Commission finds that today, despite its lower spectrum holdings in relation to the traffic carried compared to other MNOs, Three's network is not [capacity constrained] and offers a very good quality of service, as confirmed by numerous consumer surveys. This is reflected in Three's continuous increase in market share in recent years.

4. [The Commission finds that Three's evidence is not convincing.]

5. [The Commission finds that Three's evidence is not convincing.]

6. [The Commission's assessment differs from Three's assessment on its capacity constraints.]

7. [The Commission's assessment on future developments differs from Three's assessment.]

8. [The Commission concludes that Three's ability to compete will not deteriorate.]

b. **O2**

9. With regard to O2, the Commission considers that O2's network (and in particular its 4G layer) [can offer good quality service]. O2's network also offers a very good quality of service to its customers, as confirmed by a high customer satisfaction and by O2's recent increases in market share.

10. The Commission considers that […] O2 [can offer good quality service on its network].

11. [The Commission finds that O2's evidence to the contrary is not convincing.]

12. [The Commission finds that O2's evidence is not convincing.]

13. [The Commission's assessment on future developments differs from O2's assessment.]

14. [The Commission concludes that O2's ability to compete is not likely to deteriorate.]

[…]